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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 313

JEAN E. KIRKLAND, ET AL., PETITIONERS

v.

CHARLES E. JOHNSON AND E. E. SCANNELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. Its order granting a preliminary injunction (Pet. App. A, 34–36; R. 146–148) is not reported. The opinion of the court of appeals (Pet. App. A, 15–31) is reported at 290 F. 2d 440.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1961. A timely petition for rehearing was denied on June 1, 1961. The petition for a writ of certiorari was filed on August 14, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals, applying the rule of *Williams* v. *Fanning*, 332 U.S. 490, to the facts of this case, correctly concluded that the district court had no power to entertain this action because it lacked jurisdiction over the Secretary of Labor, an indispensable party.

STATUTE AND INTERNATIONAL AGREEMENT INVOLVED

The pertinent provisions of Title V of the Agricultural Act of 1949, as amended, 7 U.S.C. 1461 *et seq.*, and the Migrant Labor Agreement of 1951, as amended, are set forth in the Appendix, *infra*, pp. 16–17.

STATEMENT

Petitioners are American employers of Mexican migrant laborers who are hired during harvesting seasons pursuant to the provisions of Title V of the Agricultural Act of 1949, 7 U.S.C. 1461 *et seq.*, and the Migrant Labor Agreement of 1951, as amended, between this country and Mexico. They brought this action prior to the cotton harvesting season of 1960, challenging the wage basis on which the Secretary of Labor certified Mexican workers to their employ, namely, that 90% of the Mexican workers employed by petitioners must earn at least 50 cents per hour. Petitioners sued three subordinate officials of the United States: Tracy Murrell, the regional director of the Bureau of Employment Security of the Department of Labor, and respondents Johnson and Scannell. Johnson is district supervisor of the Bureau of Employment Security at McAllen, Texas, and

Scannell is manager of the migrant labor reception center at Hidalgo, Texas. Petitioners' complaint also named as defendants former Secretary of Labor James P. Mitchell and Robert Goodwin, National Director of the Bureau of Employment Security, but they admittedly failed to obtain service on these officials in Washington, D.C. It has been their contention that full relief could be afforded against local officials Johnson and Scannell (R. 18–19).[1]

The district court granted petitioners a preliminary injunction (R. 146–148). This action was reversed on appeal by the Court of Appeals for the Fifth Circuit for lack of an indispensable party, the Secretary of Labor (Pet. App. A, 15–31).

A. The migrant labor program and the proceedings below

The migrant labor program, as established by statute and international agreement with Mexico, provides a means by which American farm employers in need of agricultural laborers for peak harvesting seasons can obtain Mexican workers, when domestic farm employees are not available, with protections afforded to these Mexican employees which were lacking in the previous utilization of "wetbacks". The use of such migrant workers is premised on there being no detrimental effect upon the wages and working conditions of domestic agricultural employees similarly employed (Pet. App. A, 17; 7 U.S.C. 1461,

[1] The complaint omitted any prayer for relief against the Regional Director Tracy Murrell (R. 18–19), and no relief was granted against him in the preliminary injunction (R. 146–148).

et seq.).[1] Under the statute, no Mexican workers are made available for employment in any area unless the Secretary of Labor determines and certifies, *inter alia*, (1) that there are not sufficient American employees available for such work and (2) that employment of such workers will not adversely affect the wages and working conditions of domestic employees. 7 U.S.C. 1463, *infra*, p. 16. Under Article 15 of the Migrant Labor Agreement, *infra*, p. 17, the wage basis for payment to the migrant laborers is established as the "prevailing wage rate paid to domestic workers for similar work at the time the work is performed * * * or at the rate specified in the work contract, whichever is higher" (Pet. App. A, 18). Under Article 15, the determination of the prevailing wage rate is to be made by the Secretary of Labor (Pet. App. A, 18). Finally, under Article 10 of the Agreement, *infra*, p. 17, only employers obtaining the required certification from the Secretary of Labor may employ Mexican workers.

On May 17, 1960, at the direction of the National Director of the Bureau of Employment Security, Robert Goodwin, the Secretary of Labor's certification of Mexican workers for the cotton harvest season of 1960 with respect to farm employers in Starr, Hidalgo, Cameron and Willacy Counties, Texas (including the petitioners), was communicated by letter

[1] For a discussion of the background and purposes of the program, other than that contained in the Fifth Circuit's opinion in this case, see its opinion in *United States* v. *Morris*, 282 F. 2d 643. We have set forth here only those basic provisions of statute and agreement relevant to the issue of certification on which the decision below was grounded.

to those employers[3] (R. 36–38). Petitioners were informed that efforts to insure their compliance with the Department of Labor's "90–10" wage policy[4] had proved unavailing in prior seasons because of the failure on the part of employers in the Lower Rio Grande Valley to keep adequate payroll records of their wage payments to Mexican workers (R. 36–37). As a result, the letter went on, the Secretary of Labor had determined that he could not certify Mexican workers to these employers at less than $2.50 per hundred weight for picking cotton during the 1960 season (R. 37). This conditional certification was explicitly based on use of the "90–10" wage policy and the Secretary's determination, pursuant to 7 U.S.C. 1463(2), that he could not certify that payment of a lower wage would not

[3] The certification and other facts were made part of a stipulation filed in the district court (R. 30–39). In addition to the stipulation, various exhibits filed by both parties and some testimony make up the substantive record in that court.

[4] This is the policy whereby, as stated earlier, the Secretary of Labor attempted to insure that at least 90% of the migrant workers would receive 50 cents per hour for piece-work. Petitioners' attack on the policy below was based on the assertion that, under the law, the Secretary could do no more than insure payment of the prevailing wage rate being paid domestic employees. The Secretary's defense of this policy was predicated, *inter alia*, on the provisions of 7 U.S.C. 1463(2), *infra*, p. 16, whereby he must determine and certify that employment of migrant workers will not adversely affect the wages and working conditions of domestic employees. No further discussion of the merits of this action is appropriate here, however, since the court of appeals based its decision on jurisdictional grounds and the petitioners have not asserted the merits as a basis for granting certiorari.

adversely affect wages and working conditions of domestic employees similarly employed (R. 37).

Petitioners protested the conditional certification of May 17, 1960, but their administrative appeal, pursued under the established procedure to the Secretary of Labor, was denied (R. 38–39). Subsequent to issuance of the conditional certification, on June 28, 1960, the Secretary of Labor established a ceiling of 55,500 Mexican workers for the Lower Rio Grande Valley (R. 34–36).

On June 29, 1960, petitioners filed their complaint in the district court, seeking relief solely against respondents Johnson and Scannell on the basis of the alleged invalidity of the May 17, 1960, conditional certification issued by the Secretary of Labor (R. 4–20). Stating that the conditional certification was illegal because of the alleged invalidity of the "90–10" wage policy on which it was based, petitioners asserted that respondents Johnson and Scannell were refusing to supply them Mexican workers at less than the $2.50 rate established by the Secretary's certification (R. 13). Petitioners also alleged that unless workers were made available to them immediately, and under contracts predicating wage payment on the basis of the prevailing wage rate rather than the "90–10" policy, they would be irreparably injured. The prayer for relief sought, *inter alia,* that the Secretary's conditional certification of May 17, 1960, be ruled "a nullity" and that, pending determination of that issue, respondents Johnson and Scannell be enjoined (1) from enforcing the wage policy established by the May 17, 1960 order, (2) from fixing or en-

forcing a wage rate other than one determined by survey to be the prevailing wage rate in supplying them with workers, and (3) from establishing a rate in excess of the prevailing wage rate in their contracts with Mexican workers (R. 18–19).

A stipulation of facts was filed by the parties on July 13, 1960 (R. 30–39). In this document, the parties stipulated as to the role and functions of the subordinate officials against whom petitioners sought relief (R. 32–34). Thus, as to Murrell, it was stipulated that he was "required to follow the policies and determinations and certifications" as established by the Secretary of Labor pursuant to the latter's exclusive authority under the law (R. 32–33). Similarly, with regard to respondent Johnson, district supervisor of the Bureau of Employment Security at McAllen, Texas, it was stipulated that his duties included "the performance of inspection, investigative and compliance functions" under the program, but that he had "no authority in any respect as to the making of certifications and determinations" under the law and "no authority to determine the wage rates" used in contracts with the Mexican workers (R. 33). He was required "to follow the policies and determinations and certifications" made by the Secretary of Labor (R. 33). It was similarly agreed that respondent Scannell, manager of a migrant labor reception center, had no authority to make determinations or certifications, or to establish wage rates under the law, and that he too was required to follow the Secretary of Labor's actions in these matters (R. 34).

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B. The decisions below

On July 19, 1960, the district court entered its order granting petitioners a preliminary injunction against respondents Johnson and Scannell (R. 146–148). By this order, the district court nullified the May 17, 1960 conditional certification and restrained the two subordinate officials from requiring petitioners, in supplying them with Mexican workers, to pay the $2.50 rate established in the conditional certification of the Secretary of Labor or any rate other than the prevailing wage rate in the area (R. 147–148). On July 22, 1960, the government appealed from this order.

On appeal, the court of appeals reversed, finding that the district court lacked jurisdiction since the Secretary of Labor was an indispensable party[*] (Pet. App. A, 15–31). Applying the standard enunciated by this Court in *Williams* v. *Fanning,* 332 U.S. 490, the Fifth Circuit held that the relief sought by petitioners—making workers available under the statutory scheme—could not be granted without a new certification by the Secretary of Labor, who had exclusive authority under the law for certifying the employment of Mexican workers (Pet. App. A, 29–30). The district court's ruling that the Secretary's certification based on the "90–10" policy was not to be enforced by the respondents could not grant effec-

[*] The court of appeals ruled that, since the cotton harvesting season of 1960 was over when the case was heard on appeal, as to this aspect it was moot. However, since the district court enjoined the officials from enforcing the 90–10 policy in all future certifications, the case, in this respect, was not deemed moot (Pet. App. A, 23).

tive relief because a new certification by the Secretary was required before Mexican workers could be obtained by petitioners (Pet. App. A, 29–30). Accordingly, without the presence of the Secretary as a party, petitioners would "gain naught by this litigation" (Pet. App. A, 29).

ARGUMENT

In holding that the district court was without jurisdiction to entertain an action seeking Mexican employees on some wage basis other than that on which the Secretary of Labor's conditional certification of petitioners was grounded, the Fifth Circuit adhered to well-established principles. The guiding standard set forth in *Williams* v. *Fanning, supra,* is that if effective relief may not expend itself against the subordinate officials sued, but requires some action on the part of the superior in Washington, that superior is an indispensable party. We submit that the decision below is plainly correct in its application of the *Williams* rule to the facts of this case; that the decision is not in conflict, but entirely consistent with, other appellate decisions applying the *Williams* rule; and that there is accordingly no basis for further review by this Court.

1. In *Williams* v. *Fanning, supra,* the plaintiff sought to compel a local postmaster to deliver mail to him and to pay out postal money orders despite a fraud order issued by the Postmaster General. This Court held that the Postmaster General was not an indispensable party to the action, because the local postmaster had responsibility for all the actions neces-

sary to accord plaintiff effective relief. The matter would be at an end if the local official desisted in such actions, and the decree, in order to be effective, need not require the Postmaster General to do a single thing (322 U.S. at 494). The Court observed:

> * * * [T]he superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. * * * [332 U.S. at 493.]

and, conversely, that the superior is not an indispensable party

> * * * if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. * * * [332 U.S. at 494.]

In applying these criteria to the instant case, the court of appeals' determination that the Secretary of Labor is an indispensable party is manifestly correct. The essential relief sought in the complaint (R. 4–20) was the furnishing to petitioners of migrant workers, albeit on the basis of a contract wage predicated on the prevailing wage rate for the area rather than on the assertedly invalid "90–10" wage basis adopted in the certification issued by the Secretary of Labor. What petitioners fail to take into account is that they could not be furnished such workers without further action by the Secretary of Labor. Once the conditional certification issued by the Secretary is rendered a nullity, as it was by the district court decree in this case, no workers may be retained or obtained in the

future by petitioners without a new certification by the Secretary of Labor. He alone is responsible, as the Fifth Circuit pointed out, for certifying areas of employment which migrant workers may enter, and for naming employers who are eligible and may be authorized to obtain such workers. Thus, any decree purporting to provide relief by way of granting a right to obtain workers on any basis whatsoever is necessarily ineffective without the presence of the Secretary of Labor.

This is plain from the applicable provisions of 7 U.S.C. 1463(2) and the Migrant Labor Agreement with Mexico. The statute, *infra*, p. 16, provides that no workers shall be available for employment in any area unless the Secretary "has determined and certified" that there are no available domestic employees, that the employment of Mexicans will not adversely affect the wages and working conditions of domestic workers similarly employed, and that efforts have been made to obtain Americans for the employment thus certified. Under Article 10 of the Migrant Labor Agreement, *infra*, p. 17, moreover, only employers obtaining a certification from the Secretary of Labor are permitted to hire Mexican nationals.

Acting under this authority, the Secretary of Labor, on May 17, 1960, issued his certification to these petitioners restricting them, because of their past actions, to eligibility to hire Mexicans only at a specified wage rate. Petitioners' administrative appeal of this ruling was denied by the Secretary. Consequently, the effort to restrain respondents from following the

terms of the Secretary's certification can avail petitioners nothing. Without a new certification from Washington, the local officials could not grant the relief demanded: making workers available on a different basis. These respondents, as the stipulation filed by the parties shows, *supra*, p. 7, had no authority whatever to furnish the requisite certifications, to make the determinations on which these certifications are based, or to fix any wage rate for contracting Mexican employees other than that furnished them by the Secretary of Labor.

Petitioners' position is not aided by the suggestion, advanced in their petition to this Court, that they could be granted effective relief by a declaratory judgment that the "90–10" policy is invalid and that the May 17, 1960 order should not be followed by respondents. The complaint, when examined in its entirety, leaves no doubt that petitioners sought a decree which would give them workers on a prevailing wage rate basis, and the order entered by the district court purported to do just that. As we have shown, such relief could only be effectuated under the statute and international agreement by further action on the part of the Secretary of Labor. In any event, relief under the Declaratory Judgment Act presupposes "a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241. The declaratory judgment procedure thus "does not confer or extend jurisdiction over an area not already covered, nor

can it be used to give relief indirectly which could not be given directly". *Clark* v. *Memolo*, 174 F. 2d 978, 980 (C.A.D.C.); *Morgantown Glassware Guild* v. *Humphrey*, 236 F. 2d 670, 672 (C.A.D.C.), certiorari denied, 352 U.S. 896. It is accordingly well settled that the rules requiring the joinder of indispensable parties are fully applicable in actions for declaratory judgments. *Samuel Goldwyn, Inc.* v. *United Artists Corporation*, 113 F. 2d 703, 707 (C.A. 3); *Delno* v. *Market Street Ry. Co.*, 124 F. 2d 965 (C.A. 9); *Bernstein* v. *Herren*, 234 F. 2d 434, 435 (C.A. 2), certiorari denied, 352 U.S. 840; Moore, *Federal Practice* (Second Edition), Vol. 3, § 19.17.

2. Petitioners cannot point to any conflict between the application of the *Williams* rule in the court below and the many applications of that rule by courts of appeals in other contexts. Indeed, the decision below is entirely consistent with other rulings. See, *e.g.*, *Glencoe Distilling Co.* v. *White*, 286 F. 2d 713 (C.A. 9); *Fagan* v. *Schroeder*, 284 F. 2d 666 (C.A. 7); *Adamietz* v. *Smith*, 273 F. 2d 385 (C.A. 3), certiorari denied, 363 U.S. 850; *Davis* v. *Trigo Bros. Packing Corp.*, 266 F. 2d 174 (C.A. 1); *Richman* v. *Beck*, 257 F. 2d 575 (C.A. 10); *Stroud* v. *Benson*, 254 F. 2d 448 (C.A. 4), certiorari denied, 358 U.S. 817; *Sellas* v. *Kirk*, 200 F. 2d 217 (C.A. 9), certiorari denied, 345 U.S. 940.[6]

[6] See, also, *Gagliano* v. *Bernsen*, 243 F. 2d 880 (C.A. 5); *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420 (C.A. 9), certiorari denied, 345 U.S. 952; *Angilly* v. *United States*, 199 F. 2d 642 (C.A. 2); *Money* v. *Wallin*, 186 F. 2d 411 (C.A. 3); *Chan Wing Cheung* v. *Hagerty*, 192 F. Supp. 452 (D. R.I.).

In *Davis* v. *Trigo Bros. Packing Corp.*, 266 F. 2d 174, for example, the First Circuit applied the *Williams* rule in a situation closely comparable to the one presented here. A Puerto Rican wine seller sought injunctive and declaratory relief, contending that the regulations issued under the Federal Alcohol Administration Act prescribing the standards of fill for wine bottles were invalid as to wine bottled in Puerto Rico. He urged, as do petitioners here, that relief could be obtained by enjoining subordinate officials from applying the allegedly invalid regulation. The First Circuit ruled, however, that the superior officer of the Internal Revenue Service was an indispensable party since, under the statutory scheme, plaintiff required a certificate to use bottles of a different size from those prescribed in the regulations. See, also, *Stroud* v. *Benson*, 254 F. 2d 448 (C.A. 4), certiorari denied, 358 U.S. 817.

In *Richman* v. *Beck*, 257 F. 2d 575 (C.A. 10), a sheep raiser brought suit against subordinate local officials for a declaration that his prior right to trail sheep across public lands had been upset by an invalid ruling of the Secretary of Interior. He asserted that all that was necessary to accord him full relief was a decree enjoining the subordinate officials from interfering with his prior right on the basis of the invalid ruling. The Tenth Circuit, however, considering a licensing or certifying scheme similar in crucial respects to the one involved here, held that the Secretary of Interior was an indispensable party since a new permit, issuing from the Secretary, was a prerequisite to enjoyment of the rights asserted by the

sheep raiser. See, also, *Sellas* v. *Kirk*, 200 F. 2d 217 (C.A. 9), certiorari denied, 345 U.S. 940.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1961.

APPENDIX

Statute and International Agreement Involved

The pertinent provisions of 7 U.S.C. 1461 *et seq.*, as amended, are as follows:

> § 1463. Certification of need for workers; consultation with employers and workers; posting of information.
>
> No workers recruited under this subchapter shall be available for employment in any area unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work for which such workers are to be employed, (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed, and (3) reasonable efforts have been made to attract domestic workers for such employment at wages and standard hours of work comparable to those offered to foreign workers. In carrying out the provisions of (1) and (2) of this section, provision shall be made for consultation with agricultural employers and workers for the purpose of obtaining facts relevant to the supply of domestic farm workers and the wages paid such workers engaged in similar employment. Information with respect to certifications under (1) and (2) shall be posted in the appropriate local public employment offices and such other public places as the Secretary may require.

The pertinent provisions of the Migrant Labor Agreement of 1951, as amended, are as follows:

ARTICLE 10. REQUISITES FOR CONTRACTING

a) No employer will be permitted to contract Mexican nationals unless:

(1) he has received an authorization,

(2) a certification has been issued with respect to his request for the employment of Mexican workers, and

(3) approval has been issued for the admission of the requested workers by the Department of Justice

* * * * *

ARTICLE 15. WAGES

The employer shall pay the Mexican worker not less than the prevailing wage rate paid to domestic workers for similar work at the time the work is performed and in the manner paid within the area of employment, or at the rate specified in the work contract, whichever is higher. The determination of the prevailing wage rate shall be made by the Secretary of Labor.

* * * * *

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